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No. 75-1605

Supreme Court of the United States

OCTOBER TERM, 1975

RICHARD NIXON,

Appellant

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
JACK ANDERSON,
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.,
LILLIAN HELLMAN, ET AL.,

Appellees

On Appeal from the
United States District Court for the District of Columbia

MOTION OF APPELLEE JACK ANDERSON TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee Jack Anderson moves the Court pursuant to Rule 16 to dismiss the appeal or affirm the judgment below on the grounds that the questions raised by the appeal are so insubstantial and the decision of the court below is so clearly correct as not to need further argument.

STATEMENT OF THE CASE

Appellant, the first President to do so, resigned the Presidency on August 9, 1974. Remaining in the White House, the Executive Office Building and various facilities of the General Services Administration and passing into the custody of appellant's successor were some 42,000,000 documents and 880 reels of tape, the overwhelming bulk of which constituted records of the conduct of the government of the United States from January 20, 1969, to August 9, 1974.

On December 19, 1974, the President signed into law the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695 (1974) [appellant's Jurisdictional Statement (J.S.), App. D]. Appellant sued to enjoin the operation of the Act and a three-judge court was convened. Voluminous evidence, including the oral deposition of appellant, was presented, briefs were filed, oral argument was heard and the court rendered the decision appealed from on January 7, 1976.

Appellant's complaint was a grab bag of constitutional claims premised on assumptions about what might happen after completion of the archival processing provided for in the Act, assumptions that, in essence, papers and tapes relating to matters of no public importance and relating to purely private concerns would be made public. Appellant claimed that the entirety of the 42 million documents and 880 reels of tape were his property and also claimed that they were affected with constitutional immunity from the reach of the law, under either the doctrine of the separation of powers, executive privilege, the Fourth Amendment's guarantees against seizure, the constitutional right

of privacy or the First Amendment's protection of political association. Appellant also asserted that the Equal Protection clause prohibited application of the Act to the records of his Presidency because no such act had been in effect for his predecessors, and asserted that as applied to the records of his Presidency the Act was a bill of pains and penalties.

THE DECISION BELOW

The court below declined to consider appellant's claims on the basis of appellant's assumptions. The court limited its inquiry to the immediate effects of the Act, not the hypothetical and speculative possibilities of what might be proposed to be released after the archival processing of the documents and tapes would begin. The court therefore limited its inquiry and its ruling to

> the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and their screening by government archivists.

App. 3a-4a. The court recognized that the regulations to be adopted pertaining to public access and the return to appellant of personal materials without any public access might eliminate any intrusion into constitutionally protected rights. App. 26a-28a.

The court below then examined each of appellant's constitutional claims and found no merit or substance in any of them.

Executive Privilege. Although the court found it difficult to find any standing in a former President to raise a

claim of executive privilege, App. 35a-40a, it did not place its decision on that ground. Instead, the court held that any interest appellant might assert was too weak to rise to constitutional heights because he had little, if any, basis to claim a privilege founded in confidentiality of Presidential communication in documents (41,800,000 out of 42,000,000) which he never saw, App. 40a-41a; because many of the 200,000 direct communications were outside the scope of Presidential duties and therefore of executive privilege; because the intrusion by archivists (themselves employees of the Executive branch) into any expected confidentiality would be "minimal" in view of the rapid erosion of any such expectation as time passes and Presidential advisors publish their memoirs, App. 41a-44a, and in view of the weakness of any such expectation given the known, uniform practice of prior Presidents to consign materials in their possession to the same government agency and its archivists, App. 43a-46a.

Separation of Powers. As with the claim of executive privilege, the court found that whatever shred of interest appellant might still retain under Article II of the Constitution and constitutional separation of powers was far outweighed by the nation's interest in preserving the materials for history; its interest in using them for the continuing processes of government; its interest in ensuring their availability as needed in judicial proceedings, App. 46a-61a, and the reasonably perceived danger of leaving the decision respecting their preservation or destruction to appellant, App. 47a.

Privacy. The court found that on the record only "a tiny fraction" of the materials could be "reasonably expected to be private," i.e., of a character to invoke a

constitutional protection of privacy, App. 69a. It found that the minimal intrusion of archival processing for the purpose of returning that "tiny fraction" to appellant was reasonable, App. 75a-82a, less than the intrusion permitted and found lawful in other circumstances, App. 83a-87a, and indeed "the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance." App. 87a-88a.

Right of Association. In response to appellant's claim of infringement of his First Amendment rights by injury to his political rights of association, the court below again noted that, like the materials that might be private, only a tiny fraction of the "great bulk" were involved and the intrusion of archival processing was minimal; and, like the materials relating to Presidential activities, appellant had already disclosed much. App. 89a-93a.

Equal Protection and Bill of Pains and Penalties. The court found ample ground for appellant to be treated differently from prior and future Presidents with respect to the records of his administration in the "adequate basis for concluding that [appellant] might not be a reliable custodian of the materials at issue." App. 93a-97a and 96a. It disposed of the claim that the Act was a "bill of pain and penalties" by pointing out that regulation and control of the processing of Presidential materials were not punishment, App. 101a, especially in light of the specific provisions of the Act giving unique procedural and access rights to appellant. App. 101a.

ARGUMENT

Appellant challenges the district court's refusal at this time to consider his hypothetical and speculative claims

(J.S. 21-22) and challenges the court's rejection of each of his constitutional claims. His challenge raises no substantial questions, and the decision below was clearly correct.

1. Appellant attempts by hyperbole to mask the lack of substance of his claims. He ignores the President's approval of the Act, and charges "Congress" with "purporting to control the . . . publication of a President's most confidential thoughts" and thereby asserting a power "to influence the internal affairs of the White House"; with "seizing . . . the materials of appellant's administration" and thereby making "an unprecedented invasion of the autonomy of the Executive Branch." J.S. 16. He charges that by the Act "Congress" asserts "dominance of the confidential, internal communications and files of a coequal branch." J.S. 17. He asserts that the Act is equivalent to making Presidential advisors' communications "currently open to public inspection." J.S. 19-20. He describes the Act as "authorizing government seizure of all the papers and effects of a man's life covering a five-and-one-half year period." J.S. 23. He claims that by the Act the nation did "summarily seize all records of the political activities and communications of a President." J.S. 26.

Of course, as the court below took great pains to point out, the Act does no such thing. It does no more than provide for archival processing of the records of the Nixon administration, the results of which will be to return all appellant's private records to him, unviolated by public access, while preserving for the government, for history and for the public the records that have traditionally been so preserved. App. 43a-46a.

Appellant's rhetoric must be read against the rapid shrinkage of the scope of his claim in the journey from the district court to this Court. In the district court, appellant claimed every one of the 42,000,000 documents that comprise the written record of his administration, App. 8a-9a and n. 1; App. 40a. In this Court, however, appellant claims only the 200,000 documents which he himself actually saw and the tape recordings of Presidential conversations. J.S. 4. Since appellant asserts that "for the most part that material has always remained segregated from the bulk of the items seized by this Act and is presently stored in approximately four small areas in the White House complex," *ibid.*, it is difficult to understand why appellant has not yet withdrawn his objection to the archival processing of the other 41,800,000 documents.

2. Appellant argues that the district court "should not have treated as premature the impact on Presidential advisors of *possible* public access" because "there is an unavoidable 'chilling' effect" on Presidential advisors. J.S. 21 (emphasis in original). He also argues that he should not have to challenge future archival decisions piecemeal. *Ibid.*

As to appellant's second point, there may well be nothing in those future archival decisions that will be subject to a non-frivolous challenge, and a court would be straying far from Article III to enter now into a hypothetical morass of infinitely variable future document-by-document decisions. As to appellant's first point, the Act postdates his administration and had no effect on his advisors, his successor approved the Act and appellant has no standing to allege a " 'chilling' effect" on future

Presidential advisors or advice. *Laird v. Tatum*, 408 U.S. 1, 12-14 (1972); *cf.* App. 89a n. 64.

3. The district court found "most troublesome" appellant's claim that archival processing would invade his privacy. Decisions of this Court announced after the decision below make the district court's rejection of the invasion of privacy claim not only less "troublesome" but clearly correct.

a. Independent processing of personal files to ensure that privacy is protected, contemplated by the Act, see App. 22a-25a, was approved by the Court in *Rose v. Department of the Air Force*, ____ U.S. ____, 44 U.S.L.W. 4503 (1976). The Court there adopted a balancing test to implement the policy of the Freedom of Information Act "to open public business to public view when no 'clearly unwarranted' invasion of privacy will result," 44 U.S.L.W. at 4512. The Court noted, in approving *in camera* judicial review to delete identifying details from files affected with a public interest,

> To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts (citations omitted).

Ibid. If anything, professional archivists are preferable to busy district judges to process records for the twin purposes of protecting privacy and opening "public business to public view."

b. The Court has now made clear that privacy interests that are inviolate for a private citizen give way when they are claimed by a holder of a public office and clash with a public interest related to that office. *Kelley v. Johnson*, ___ U.S. ___, 96 S. Ct. 1440 (1976). Appellant, of course, has rights of privacy "with respect to certain basic matters of procreation, marriage and family life," *Kelley, supra*, 96 S. Ct. at 1444, and *cf. Paul v. Davis*, ___ U.S. ___, 44 U.S.L.W. 4337, 4343 (1976). But when he assumed the Presidency, he gave up his absolute rights of privacy as one of "the citizenry at large," *Kelley, supra*, 44 U.S.L.W. at 1444, and the Act's provision for the use of archivists to cull out and return to him any purely private records is justified, indeed necessary and traditional for a President, even though it would not be justified for a private citizen. In short, the Act and the archival processing it provides "touch" appellant as a former government official with respect to the records of his tenure, *ibid.*, and he has no "legitimate expectation of privacy" in the "business records" of the conduct of his Presidency, for which he "can assert neither ownership nor possession." *Cf. United States v. Miller*, ___ U.S. ___, 44 U.S.L.W. 4528, 4529-30 (1976).

4. Appellant's assumption of office likewise reduces his right to First Amendment protection of political activities that are inextricably related to the conduct of such office. The right of free communication guaranteed in public streets and parks may be limited on government facilities, *cf. Greer v. Spock*, ___ U.S. ___, 96 S. Ct. 1211, 1217 (1976); an army officer must accept a restriction on First Amendment protections in relation to his responsibilities as an officer, *cf. Parker v. Levy*, 417

U.S. 733, 94 S. Ct. 2547 (1974), and civilian government employees must accept restrictions on their political rights, *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 93 S. Ct. 2880 (1973). As Justice Powell noted in *Greer,* such First Amendment rights "may be circumscribed when necessary to further a sufficiently strong public interest," as long as the infringement "is limited narrowly to the protection of the particular government interest involved," 96 S. Ct. at 1219, 1222 (concurring opinion). Justice Powell no more than echoed the unanimous holding of the Court in *Buckley v. Valeo,* ___ U.S. ___, 96 S. Ct. 612, 638 (1976), that

> [e]ven a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

5. *Buckley v. Valeo, supra,* also decided after the decision appealed from here, confirmed the importance, as a public interest justifying possible limitations on First Amendment rights, of the need for public disclosure of facts relating to corruption and abuse of our political institutions to promote the general health of those institutions. This interest, the first listed purpose of the Act, § 104(a)(1), App. 112a, was relied on by the court below, App. 58a, *inter alia,* as justifying the Act's provision for archival processing in the face of the risk of distortion or destruction of records of "Watergate" should the materials have come into appellant's hands, App. 47a-48a.

In *Buckley* the Court upheld the Federal Election Campaign Act's campaign contribution disclosure provisions, in the face of the established principle that "disclosure, in

itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 96 S. Ct. at 656. The potential infringement of First Amendment rights by "compelled disclosure" was outweighed by governmental interests in which "the 'free functioning of our national institutions' is involved," *id.* at 657: to wit, the need to provide "the electorate with information" about political money, to deter corruption by "exposing large contributions and expenditures to the light of publicity" and to gather "the data necessary to detect violations," outweighed disclosure's potential effects of deterring contributions and making possible harassment of or retaliation against contributors. *Id.* at 657-58. The Court approved the disclosure provisions as "part of Congress' effort . . . to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 662. As the Court noted, the legislation's purpose was "to limit the actuality and appearance of corruption," and was directed at preventing the reoccurrence of "such pernicious practices" as "the deeply disturbing examples surfacing after the 1972 election . . . .," 96 S. Ct. at 638. The Act challenged here provides for disclosure of the same collection of abuses for the same salutary reforming purpose. P.L. 93-526, § 104(a)(1); H.R. Rep. No. 93-1507, 93d Cong. 2d Sess. (1974) at 2.[1]

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[1] In *Buckley,* 96 S. Ct. at 638 n. 28, this Court referred to the Court of Appeals' catalogue of these abuses, at 519 F.2d 839-40 and nn. 36-38. The examples given there are but a few of the "Watergate" subjects, defined for the purposes of the Act by GSA in its proposed regulations, § 105-63.104(c), as the alleged acts within the purview of the Senate Select Committee on Presidential Campaign Activities or within the matters reported by the House Judiciary

(Continued)

Appellant's First Amendment associational interests affected by the Act are weaker than those found outweighed in *Buckley*. Unlike the FECA, the Act appellant challenges here does not require disclosure of and thus does not affect or inhibit appellant's present or future political associations. Any embarrassment that might result from the possible disclosure of his past political conversations as President after the archival processing provided by the Act, is far outweighed by the interest in informing the public respecting the abuses of our political institutions which the *Buckley* Court had before it in upholding the FECA's disclosure provisions.

CONCLUSION

There are no substantive questions raised by the appeal which have not been decided by previous decisions of this Court. The appeal should be dismissed or the judgment below summarily affirmed.

Respectfully submitted,

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[1](continued) Committee in its impeachment inquiry, H.R. Rep. No 93-1305, 93d Cong. 2d Sess. (1974). See also, in the legislative history of the Act, the reference to the scope of "Watergate" in S. Rep. No. 93-1181, 93d Cong. 2d Sess. (1974) and H.R. Rep. No. 93-1507, 93d Cong. 2d Sess. (1974) at 2.